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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY, *Petitioner*,

—against—

THE UNITED STATES, *Respondent*.

On Writ of Certiorari to the United States Court of Claims

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

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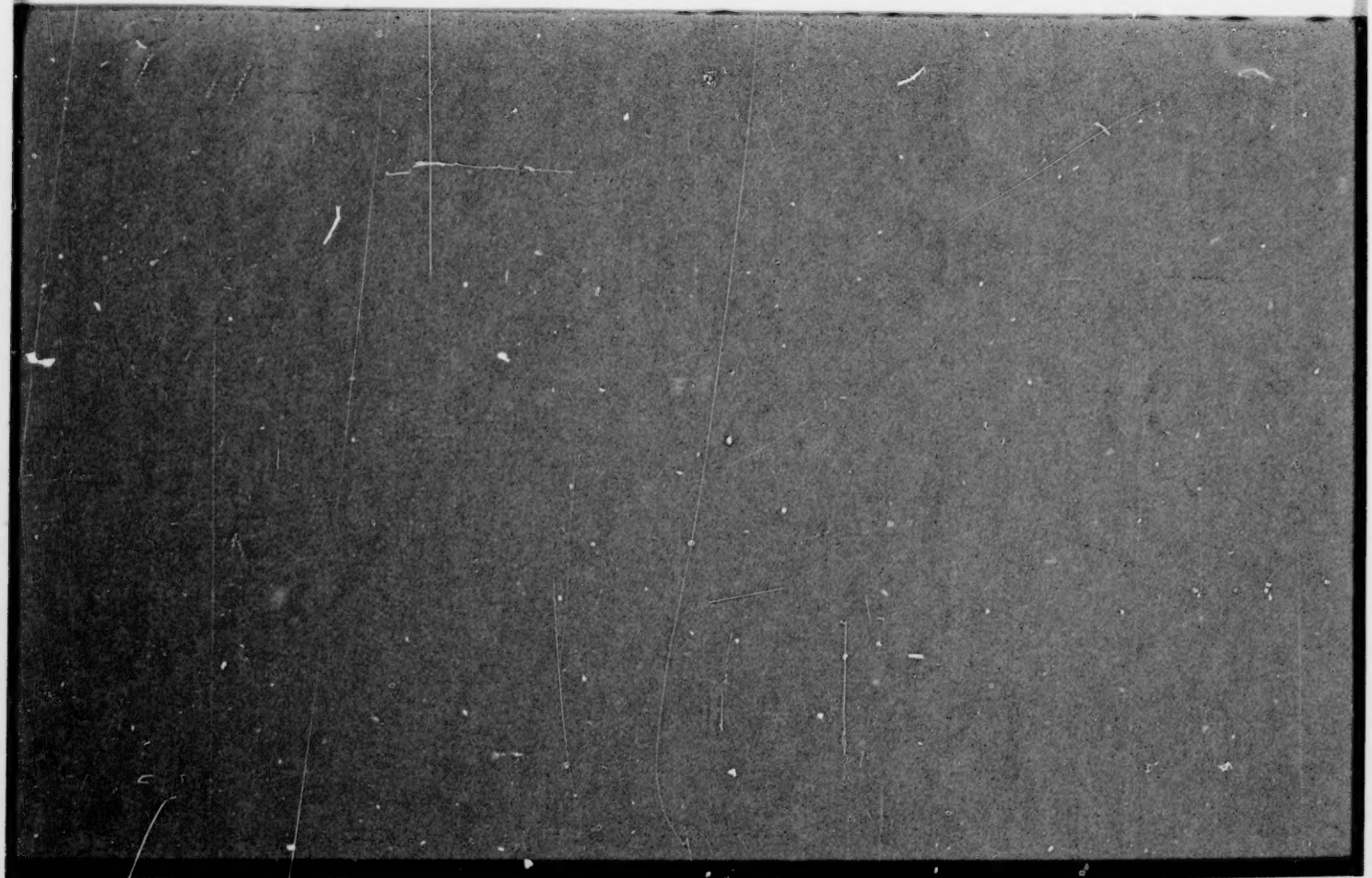

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION, AMICUS CURIAE

With the consent of both parties, the National Education Association of the United States respectfully submits this brief *amicus curiae* in support of the Respondent.

The letters of consent have been filed with the Clerk of this Court.

QUESTIONS BEFORE THE COURT

"Putting the wrong questions is not likely to beget right answers even in law", according to Mr. Justice Frankfurter.[1] And Mr. Justice Rutledge once said:

> "To state the question often is to decide it. And it may do this by failure to reveal fully what is at stake."[2]

Amicus respectfully suggests that the Petitioner has put "the wrong question" before this Court, and that its question fails "to reveal fully what is at stake."

Amicus believes that the dispositive questions are as follows:

1. *Constitutional*

   Does "fair use" have constitutional protection under the Bill of Rights?

2. *Custom and "Fair Use"*

   Is a customary use a "fair use", without regard to the normally applicable criteria used in the absence of such custom?

Amicus respectfully suggests that the answer to these questions is as follows:

1. *Constitutional*

   "Fair use" has constitutional protection under both the First and Ninth Amendments. Reasonable resort to this protection has priority over the mere privilege accorded to the copyright

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[1] *Vanston Bondholders Prot. Com.* v. *Green et al.*, 329 U.S. 156, 170 (1946) (concurring).

[2] *Yakus* v. *U. S.*, 321 U.S. 414, 482 (1944) (dissenting).

owner by permissive and non-mandatory action of the Congress under the copyright clause of Article I, § 8.

2. *Custom and "Fair Use"*

A customary use *is* a fair use, without need for compliance with criteria which are applicable and necessary where custom is not involved.

THE INTEREST OF THE NATIONAL EDUCATION ASSOCIATION

The decision of the Court below has implications which seriously affect millions of teachers and multiple-millions of students in America's schools. If the decision of the Court of Claims is not allowed to stand, it could well limit the capacity of the American school system to teach effectively. While the case before the Court involves library activities, in the broad reach those activities are educational in nature.

The National Education Association of the United States (incorporated under a statute of the Congress) is the largest professional organization in the United States. With the combined membership of its State and local affiliates, the NEA represents approximately two million of the nation's educators, with elementary and secondary classroom teachers and college professors making up about 90% of its membership.

The NEA is an independent, voluntary, nongovernmental organization whose Congressional charter designates its purpose as "to elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States," 30 STAT. 805, Section 2 (June 30, 1906). To further this end, it strives for the improvement of the professional status of teachers.

NEA's interest in the copyright law is of long standing. For example, in 1963, it was instrumental in creating an *Ad Hoc Committee on Copyright Law Revision*, which includes representatives of some 42 educational organizations covering the full range of education in the United States. This independent committee has been chaired by an NEA staff member. The group meets regularly to study proposed copyright legislation and to make recommendations to the Congress in behalf of the public interest.

The NEA's continuing resolution on copyright law revision, passed by the Delegate Assembly in 1971 and readopted annually since then, starts with the following sentence:

> "The National Education Association believes that maximum access to teaching materials is of vital concern to every teacher." 1971-72 NEA HANDBOOK FOR LOCAL, STATE AND NATIONAL ASSOCIATIONS (Oct. 1971), pp. 88-89.

The copyright law affects the teaching process at its inner core. Formerly, teachers tended to use the same textbooks for all pupils. Today's teacher uses many resources in his teaching. He has a variety of texts and supplementary materials, including trade and reference books, newspapers and magazines, educational motion pictures, film strips, audio and video tapes and cartridges, overhead transparency projectors, record players, slides, instructional TV and radio, programmed instructional material, and computer-assisted instruction. The modern teacher uses all of these resources in orchestration to do specific jobs. He selects resources to fit particular learner needs and objectives.

The most effective teachers are those who capture the mood of the moment, who use some suddenly discovered

motivation of their pupils at the teachable moment. The copyrighted works most needed by teachers are recent and contemporaneous materials, not text books. Teachers want to update texts and have their classroom work relevant and meaningful to current developments. It is because of such materials and needs, and because of the newer educational technologies, that most of education's copyright problems arise.

Perhaps the most dramatic example of the kind of copyright problems faced by teachers was the reading of Robert Frost's poem, "The Gift Outright", at President Kennedy's inauguration. Many English teachers used it in the immediately following days, to illustrate the value of poetry in capturing the spirit and essence of a key moment in our national consciousness. The poem was copyrighted but not available in any textbook. Should a teacher deprive his students of such a universal national experience because the poem was not in the textbook? For many younger students in American schools this might be the first introduction to one of America's outstanding poets. Obviously, teachers could not have planned ahead for this situation. The copyright problems of teachers are infrequently so dramatically illustrated as with the Frost poem but they occur daily and are critical to meeting the needs of effective teaching.

Would it advance the public interest, would it be consonant with the provisions and purpose of the copyright clause of the Constitution, to lose the teachable moment by waiting for months to get the book through purchase or permission to copy, for a one-time use whose timeliness would long since have disappeared?

NEA believes that immediate use of the Frost poem was a typical educational "fair use" authorized under

the copyright law. Such use is consonant with the Supreme Court's concept of the importance of education today:

> "Today, education is perhaps the most important function of state and local government . . . It is required in the performance of our most basic responsibilities . . . It is the very foundation of good citizenship. Today it is a principal instrument for awakening . . . cultural values, in preparing . . . for later professional training and in helping . . . to adjust normally to his environment."[3]

In more recent times, the resignation of President Nixon presents similar "fair use" problems to teachers using portions of copyrighted newspapers or magazines for the improvement of education without detriment to the publishers.

The NEA believes that the Constitution's copyright clause and the "fair use" doctrine must be interpreted so as to support, not to restrict, good teaching practices, by assuring non-profit and non-commercial educational purposes of a reasonable and ready access to teaching materials. In particular, the opinion below affects two aspects of "fair use" that are of utmost importance to America's pupils and teachers:

(1) the customary and long-established practice of teachers in making limited copies of copyrighted print materials for classroom use and teaching purposes; and

(2) the opportunity to meet instructional requirements through access to copyrighted materials by means of the new educational technologies, such as audio-visual materials, broadcast materials, and others.

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[3] *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).

Special Problem: Legislation Under Consideration. As already indicated, this case involves more than the customary concern of an *amicus*. The reversal of the decision below may well decide the meaning of pending Congressional legislation for comprehensive copyright revision in a manner wholly inconsistent with the Congressional understanding of the meaning of "fair use" as heretofore interpreted by the courts.

For many years the Congress has been considering proposals for comprehensive revision of the current copyright law which was adopted in 1909. Extensive hearings have been completed in both the House and the Senate. Thus far, only the House has passed a bill. The House Judiciary Committee reported a bill in 1966 (H. Rep. No. 2237, 89th Cong., 2d Sess.); and again in 1967 (H. Rep. No. 83, 90th Cong., 1st Sess.) (A bill is now pending in the Senate, S. 1361, Sen. Rep. No. 93-983.)

The report of the House Judiciary Committee clearly reflects vigorous and controversial debate, during extensive hearings, over the meaning of "fair use" for education. For the first time, the Committee proposed statutory recognition of "fair use". The House report indicated some key factors behind its judgment:

(1) There are no judicial precedents for the meaning of "fair use" in connection with nonprofit schools.[4]

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[4] See also Sen. Rep. No. 93-983, 93rd Cong., 2nd Sess. (1974), p. 116. ". . . the case law on fair use has not dealt with photocopying and the analogous forms of reproduction" for educational purposes. ". . . as to cases of copying by teachers . . . in this area there are few if any judicial guidelines,". House Rep. No. 2237, 89th Cong., 2nd Sess., on H.R. 4347, pp. 60-1. See also statement by Copyright Office's General Counsel: ". . . The decisions have not dealt with copying specifically for the purpose of teaching or

(2) In adopting statutory "fair use", the Committee "intended to restate the present judicial doctrine of fair use", neither augmenting nor constricting it.[5]

(3) To give some guidelines of what such statutorily-adopted judicial "fair use" means, the Committee set forth at length specific examples of school and teaching activities which in its judgment are such "fair use".

The significant fact is that in arriving at such examples, the House Judiciary Committee relied on no judicial precedents and cited none. Instead, virtually all of its examples as to legally acceptable educational "fair use" were adopted substantially, if not in *haec verbi,* from examples which a parade of educational witnesses had described as being the long-standing *custom* of schools and teachers.[6] Thus, we have here a Congressional understanding that judicial "fair use" derives from the *custom followed in schools.*

Amicus respectfully suggests that there is a fundamental inconsistency as to the origin and meaning of "fair use", between the Reports of the House and Senate Judiciary Committees and the Petitioner's position, and that such difference might be crucial to the operability of America's schools. The Petitioner's view undercuts the understanding of the House and

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research. The formulation in the bill does; it cites, as examples of purposes for which copying or other uses might qualify as fair use . . .", Goldman, *Can Copyright Law Revision Respond to the New Technology?*, 64 LAW LIBRARY J. (No. 4, Nov. 1968), 387 at 393.

[5] House Rep. No. 83, 90th Cong. 1st Sess. (1967), p. 32. To same effect: Sen. Rep. No. 93-983, 93rd Cong., 2nd Sess. (1974), p. 116.

[6] See, for example, *New Technology and the Law of Copyright: Reprography and Computers,* 15 UCLA L. REV. 939, 953 (1968).

Senate Judiciary Committees as to the judicial doctrine of "fair use" and therefore vitiates the entire basis for the House's action. The Petitioner's refusal to accept and give effect to customary use as "fair use" runs directly counter to the obvious intent and understanding of the Senate and House Committees in turning to educational custom to describe the judicial "fair use" which it was accepting by statute for educational purposes.

The House Judiciary Committee's report is specifically designed, in part, to protect the educational community of America,[7] by specifying what "fair use" means for the nation's schools. The Petitioner would, on the other hand, negate the substance of that legislative understanding. *Amicus* asks this Court, among other things, to vindicate the basic concept of "fair use" upon which the reports of both Judiciary Committees are based, and which is rejected by the Petitioner, *i.e.*, that customary use *is* "fair use".

What is at stake here, therefore, is not only the future of judicial determinations of "fair use" under the present law but also the meaning, *in futuro*, of comprehensive copyright law revision so far as it intimately affects America's schools.

In one respect, The National Education Association agrees with comments made by several *amici curiae* in support of the Petitioner on the Petition for a Writ of Certiorari, as follows:

> 'The crux of the issue, however, is not limited to the precise facts of this particular case. It lies in

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[7] House Rep. No. 2237, 89th Cong., 2nd Sess., on H.R. 4347 at pp. 60-1. Cf: Sen. Rep. No. 93-983, 93rd Cong., 2nd Sess. (1974), p. 116.

the principles of law enunciated by the Court below." American Guild of Authors and Composers, *et al.*, pp. 7-8.

"1. The Court's decision below, especially its rationale, (a) has an importance transcending the interests of the particular litigants . . ." Magazine Publishers Association, Inc., p. 3.

Indeed, the Petitioner itself "recognizes implications beyond the instant case", Brief p. 29.

This case is one of first impression. The Court of Claims called it "ground breaking", 487 F.2d 1345, 1346 (1973) and stated there the issue had never been determined by a court (at 1347) and that there were no prior dispositive decisions (at 1352). We have here a case where the parties have raised fundamental issues of the relationship between proprietors and users of copyrighted material; of basic questions of constitutional, statutory and common law; and of delicate questions of the judicial balancing of rights to which monopolistic claims are asserted by one side. The Court's decision as to the meaning of "fair use" will have far-ranging implications which can either advance or retard the all-important functions of America's schools. It is in this context that the National Education Association asks this Court to make its determinations in a manner conducive to, and supportive of, the finest possible educational system in this country.

In circumstances such as here indicated by the various *amici curiae,* where the issues extend far beyond the particular interests of the parties themselves, the NEA believes that the Court below was eminently correct in stating that in the "balance of risks", the balance should be in favor of the public interest represented by the Respondent.

ARGUMENT

I. CONSTITUTIONAL ISSUES

At Heart of the Case

Constitutional issues are at the very heart of this case.

Amicus respectfully suggests that "fair use" (or the right of reasonable access to copyrighted materials) has constitutional protection under the First and Ninth Amendments in the Bill of Rights. This constitutional dimension protects the right of reasonable access to the cultural, educational, scientific, historical, technical and intellectual heritage of the Nation.

This right has constitutional protection both directly and under the penumbra of

(a) the First Amendment (Freedom of Press), and

(b) the Ninth Amendment.

This case involves a conflict between

(a) the American public's *constitutional right* of reasonable access to copyrighted materials, and

(b) the copyright owner's *statutory privilege* emanating from the copyright law. In this latter connection, the Constitution gives *no* constitutional *right* to copyright owners. It merely authorizes the Congress, under severe limitations, to enact copyright legislation. At most, therefore, the copyright owner has a statutory *privilege,* not a constitutional *right.*

Consequently, in the necessary "balancing" process which this Court must undertake, the "balance" must

be in favor of the overriding and constitutionally-protected right of the American public to reasonable access to its national heritage, copyright notwithstanding. In this context, "fair use"—as a constitutionally protected right—fully sanctions the Respondent's practice in the instant case.

Need for Constitutional Decision

This Court has said: "Federal statutes are to be so construed as to avoid serious doubt of their constitutionality".[8]

Elsewhere this Court has

> "repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same".[9]

Amicus respectfully submits that, in order to avoid an unconstitutional result as applied to the facts of this case, the proper application of the First Amendment's provision protecting Freedom of Press and the Ninth Amendment's reservation of unenumerated rights to the people require interpreting the copyright clause of the Constitution, the copyright act, and the term "fair use" to authorize the long-established practice followed by Respondent in this case.

Even where it has not been necessary to reach constitutional issues to decide a case before it, this Court has specifically expressed its view on the constitutional

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[8] *International Association of Machinists* v. *Street*, 367 U.S. 740, 749 (1961). See also *Dennis* v. *United States*, 341 U.S. 494, 501 (1951); *Communist Party* v. *Catherwood*, 367 U.S. 389, 392 (1961).

[9] *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). See also *United States* v. *Rumely*, 345 U.S. 41, 45 (1953) and cases therein cited.

questions which would have been present "if reached by the court." [10] On occasion this Court has deliberately decided to reach the constitutional issue, although the case could have been decided on other grounds, because it was necessary to solve such constitutional issue in order to avoid future difficulties.[11]

This Court has also indicated that it will delve into certain areas, albeit rarely,

> "not only to make sure that substantive constitutional standards have not been thwarted, but also to provide guidance for the future to the lower courts in an area which borders so closely upon constitutionally protected rights".[12]

The instant case is peculiarly fitting, and calls out, for constitutional clarification and interpretation.

This Court may be confronted with the argument that the Constitution authorizes the Congress to enact copyright legislation. Without reference to the limited authority thus conferred, and without further reference hereinafter to the *amicus's* illustration of the difference between a constitutional right and a statutory privilege, a recent statement of this Court is applicable:

> "The existence of a permissible purpose cannot sustain an action that has an impermissible effect".[13]

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[10] *Peters* v. *Hobby*, 349 U.S. 331 (1955); *Kent* v. *Dulles*, 357 U.S. 116, 129-130 (1958). *Semble*, *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 72 (1955). See also *Volanski* v. *United States*, 246 F.2d 842, 845 (6th Cir. 1957), per Stewart, C. J.

[11] *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952). *Cf: United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 387 (1948) ("While this issue need not be decided to dispose of this case, it seems inadvisable to leave the decision as a precedent.")

[12] *Scales* v. *U.S.A.*, 367 U.S. 203, 230 (1961).

[13] *Wright* v. *Emporia City Council*, 407 U.S. 451, 462 (1972).

In *Wright* v. *Emporia City Council, supra,* n. 13, this Court said it "focused upon the effect—not the purpose or motivation— . . ." [14]

As Justice Black declared in another context,

> "Freedom of the Press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." [15]

Very recently, this Court also stated that

> "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." [16]

The constitutional issue is clearly before the court and requires adjudication in this case.

A. The Constitution Grants No Rights to Copyright Owners

Article I, §8, of the Constitution grants no rights to authors; it merely grants power to Congress to enact copyright legislation. This Court so ruled in the very first case in which it considered this problem. There, counsel for complainants insisted that the constitutional provisions did not originate a right but merely protected one already in existence. This Court specifically rejected this argument as to copyright for published material:

> "Congress then, by this act, instead of sanctioning an existing right, as contended for, created it. . . . This right, as has been shown, does not exist at com-

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[14] *Ibid.*, at 462.

[15] *Associated Press* v. *U.S.*, 326 U.S. 1, 20 (1945).

[16] *Grayned* v. *City of Rockford*, 408 U.S. 104, 114 (1972).

mon law—it originated, if at all, under the Acts of Congress." [17]

The House Report on the current Copyright Law of 1909 also made this same point crystal clear:

> "The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights. . . . The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best." [18]

A long and uninterrupted line of cases holds unequivocally that—apart from common law protection for unpublished works—copyright protection is completely and solely a matter of statute [19] and that copyright is only a privilege or a franchise.[20] Under this Court's rulings it is settled law that any copyright right is simply a creature of statute.[21] As distinguished from

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[17] *Wheaton* v. *Peters*, 8 Pet. 591, 661, 663 (1834). To the same effect, see *Mazer* v. *Stein*, 347 U.S. 201, 214 (1954); *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127 (1932); *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U.S. 182, 188 (1909).

[18] House Report No. 2222, 60th Cong., 2d Sess., p. 7.

[19] *Miller Music Corp.* v. *Daniels, Inc.*, 362 U.S. 373, 375 (1960); *Bentley v. Tibbals*, 223 F. 247, 248 (2d Cir. 1915); *Grant* v. *Kellogg Co.*, 58 F.Supp. 48, 52 (S.D. N.Y. 1944), *aff'd* 154 F.2d 59 (2d Cir. 1946); *Bobbs-Merrill Co.* v. *Strauss*, 210 U.S. 339, 346 (1908).

[20] *Local Landmarks* v. *Price*, 170 F.2d 715, 718 (5th Cir. 1948).

[21] *American Tobacco Co.* v. *Werckmeister*, 207 U.S. 284, 291 (1907); *Bobbs-Merrill Co.* v. *Strauss*, *supra* n. 19 at 346, *White-Smith Music Pub. Co.* v. *Apollo*, 147 F.226, 227 (2d Cir. 1906), *aff'd* 209 U.S. 1, 15 (1908). See also *Loew's Inc.* v. *C.B.S.*, 131 F. Supp. 165, 173 (1955), *aff'd* 239 F.2d 532 (9th Cir. 1956), *aff'd* by equally divided court, 356 U.S. 43 (1958).

literary property, copyright is wholly a matter of Congressional discretion to grant or to withhold.[22] This Court recently held that in connection with copyrights "the Constitution is permissive" not mandatory.[23]

This Court has also held that the conditions upon which copyright is granted are wholly within the constitutional power of Congress to prescribe.[24] The whole history of the copyright law shows that an author has no constitutional property right in or to copyright protection and that such "right" as an author obtains is a privilege to be granted or withheld by Congress in its discretion. As the House Report on the present copyright law said of copyright rights granted to authors: "... Congress has the power to annex to them such conditions as it deems wise and expedient." [25] The very first copyright law, enacted in 1790, 1 STAT. p. 124, c. 15, gave protection only to maps, charts and books, and that only for a 14-year period plus renewal of 14 years. It did not cover periodicals, drawings, works of art, musical composition, dramatic composition—to name but a few. And even the present far more extensive law of 1909 is not all-inclusive and places limits on authors' copyright privileges. Congress has limited the number of years during which an author may exercise copyright

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[22] *Kraft* v. *Cohen*, 117 F.2d 579, 580 (3d Cir. 1941); *Keene* v. *Wheatley*, 14 Fed Cas. 180, 185, #7644 (Cir.Ct.Pa. 1820).

[23] *Deepsouth Packing Co., Inc.* v. *The Laitram Corp.*, 406 U.S. 518, 530 (1972).

[24] *Wheaton* v. *Peters*, *supra* n. 17, at 663-4 (1834). See also *Application of Cooper*, 254 F.2d 611, 616 (C.C.P.A. 1958), *cert. denied* 358 U.S. 840 (1958); *Stuff* v. *La Budde Feed & Grain Co.*, 42 F. Supp. 493, 496 (E.D. Wis. 1941) (See NIMMER ON COPYRIGHTS (1972), p. 14.).

[25] *Op. cit.*, *supra* n. 18, p. 9.

monopoly privileges. Congress has limited the uses to which the copyright owner's privileges attach, *i.e.,* the "for profit" limitation on public performance rights; compulsory licenses; the non-inclusion of "rental rights", to cite but a few.

In addition to Congressional limitations of any so-called "property" rights in copyright, the courts have also developed a further limitation through the doctrine of "fair use"—which is the dispositive issue in this case.

And just over two years ago this Court, speaking through the Chief Justice, ruled that the constitutional copyright provision does not even provide exclusive Federal control over copyrights.[26]

Thus, it is clear that copyright is a privilege conferred by statute and not a right guaranteed by the Constitution.

B. The First Amendment Protects the American People's Right of Reasonable Access to Matter Subject to Copyright.

The First Amendment's guarantee of Freedom of the Press protects the American people's right of reasonable access to copyrighted material against the monopoly of a rigid construction of the privilege afforded under the copyright statute. In the balancing of a copyright proprietor's statutory privileges against the constitutional protection for the people's *right to know* and *right to read,* the balance must be struck in favor of the constitutional right. Although protected by the statute, the copyright privilege does not prevail against the constitutional guarantee of the First Amendment.

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[26] *Goldstein et al.* v. *California,* 412 U.S. 546, 553, 558 (1973).

1. *Freedom of Press Protects the American People Not Publishers*

The American people's rights are at stake here. More particularly, the rights of America's teachers and students, as individuals and as teachers and students, are in jeopardy unless the decision below is upheld.

The Bill of Rights exemplified a clear rationale for Freedom of Press, that a free press was the only instrumentality for protecting the American people's *right to know.*

This Court has long recognized that a free press is essential for a free people. Mr. Justice Black wrote for the Court:

> "The First Amendment . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." [27]

Mr. Justice Frankfurter said in the same case that "the business of the press . . . is the promotion of truth regarding public matters by furnishing the basis for an understanding of them", and that the basic function which a Constitutionally guaranteed free press serves in our nation "is to have the flow of news not trammelled." [28]

Throughout our national history this concept of the press as an instrumentality of the American people has been pervasive in judicial readings of the First Amend-

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[27] *Associated Press* v. *U.S.*, 326 U.S. 1, 20 (1945).

[28] *Ibid.*, pp. 28, 29.

ment. Mr. Justice Sutherland wrote in connection with a claim of abridgement of freedom of press:

> "The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information." [29]

Freedom of Press is a right of the American people; the press is a trustee of that right. Freedom of Press was not designed as a special privilege for the publishing business, but rather as an extension of the personal rights of each American. It is a guaranty of the individual's rights, and was thus joined in the First Amendment of the Bill of Rights with the rights of free speech, assembly and petition.

This Court has characterized "the freedom of speech and that of press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men." [30]

This Court has also recognized that the First Amendment's guarantee of freedom of press is "not for the benefit of the press so much as for the benefit of us all." [31]

"Free press" is only a shorthand way of saying that the press must be free because of the right of all Americans to be informed. Arthur Hays Sulzburger of the

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[29] *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

[30] *Schneider* v. *State*, 308 U.S. 147, 161 (1939).

[31] *Time, Inc.* v. *Hill*, 385 U.S. 374 389 (1967). See also *United States* v. *Powell*, 171 F.Supp. 202, 205 (N.D. Calif. S.D. 1959).

New York Times addressed the Trustees of the New York Public Library on this issue:

> "Perhaps we ought to ask ourselves now just what freedom of the press really is . . . Freedom of press —or, to be more precise, the *benefit* of freedom of the press—belongs to everyone, to the citizen as well as the publisher. The publisher is not granted the privilege of independence simply to provide him with a more favored position in the community than is accorded to other citizens. He enjoys an explicitly defined independence because it is the only condition under which he can fully perform his role, which is to inform fully, fairly and comprehensively. The crux is *not* the publisher's freedom to print; it is rather the citizen's right to know! What I would point out is that freedom of the press is your right as citizens and not mine as a publisher." [32]

Col. Robert R. McCormick of the *Chicago Tribune* said: "The freedom of the press is the freedom of the American people." [33]

Elisha Hanson, distinguished counsel for the American Publishers Association, put it thus:

> "The right to have a free press is the right of the people, not a privilege of a particular segment of our economy engaged in the business of gathering and disseminating information in printed form. Publishers are but trustees of this right." [34]

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[32] Nov. 13, 1956. Privately printed, p. 9.

[33] McCormick, *The Case for Freedom of the Press* 23 (1933).

[34] *The Two Bulwarks of Liberty: A Free Press and an Independent Judiciary*, 41 A.B.A.J. 217, 218 (1955).

2. *The Right of Access is an Integral Part of the Rights Guaranteed by the Bill of Rights*

The right of access, as such, has been increasingly recognized by this Court as an integral part of the rights guaranteed by the Bill of Rights. Thus,

—the right of "suitable access to social, political, esthetic, moral and other ideas and experiences . . ." [35]

—the right to "receive information and ideas" [36]

—the right to receive printed matter [37]

—the right of access to certain religious publications [38]

—the right of access to a sufficient library to permit prisoners to prepare legal papers [39]

—the right of access to the Courts [40]

—the right of addressees of letters to read the letters without censorship [41]

Just as such rights of access are ancillary to, and come within the penumbra of, rights protected by the

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[35] *Red Lion Broadcasting Co.* v. *F.P.C.*, 395 U.S. 367, 390 (1969).

[36] *Kleindienst* v. *Mandel et al.*, 408 U.S. 753, 760, 762-5 (1972); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969).

[37] *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965).

[38] *Cruz* v. *Beto*, 405 U.S. 319 (1972).

[39] *Martin* v. *City of Struthers*, 318 U.S. 141, 143 (1943). See also *Younger et al.* v. *Gilmore et al.*, 404 U.S. 15 (1971) (under equal protection clause of 14th Amendment.

[40] *California Motor Transport Co. et al.*, v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972).

[41] *Procunier* v. *Martinez*, 416 U.S. , 94 S. Ct. 1800, 1809 (April 29, 1974).

Bill of Rights [42] (or other provisions of the Constitution), so the right of reasonable access (through "fair use") to copyrighted materials pertaining to the cultural, historical, educational, scientific, technical, and religious heritage of the nation comes within the penumbra of the right of Free Press guaranteed by the First Amendment.

3. *The Rights of Free Press and Free Speech Include the RIGHT TO READ*

The First Amendment would be sterile today if its sanctions were limited to the mere act of printing or writing. The *Zenger Case* decided that over 200 years ago.[43] This Court has not so limited Freedom of Press:

> "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." [44]

This Court ruled that Freedom of Press protects not only the publisher's right to print [45] and to publish,[46]

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[42] For the *right to hear* as being within the penumbra of the Freedom of Speech provision of the First Amendment, see *Thomas* v. *Collins*, 323 U.S. 516, 534 (1945). See also *Molpus* v. *Fortune*, 432 F.2d 916 (5th Cir. 1970); *Pickings* v. *Bruce*, 430 F.2d 595, 598-9 (6th Cir. 1970); *Brooks* v. *Auburn University*, 412 F.2d 1171, 1172 (5th Cir. 1969); *ACLU* v. *Radford*, 315 F. Supp. 893 (E.D. Va. 1970); *Smith* v. *University of Tennessee*, 300 F. Supp. 777 (E.D. Tenn. 1969); *Snyder* v. *Board of Trustees*, 286 F. Supp. 927 (N.D. Ill. 1968).

[43] As far back at 1644, Milton's *Areopagitica* was a defense of "the liberty of unlicensed printing", McKEON, MERTON & GELLHORN, THE FREEDOM TO READ 43 (1957).

[44] *In the Matter of Jackson*, 96 U.S. 727, (1878), cited with approval in *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938).

[45] *Lovell v. Griffin, supra* n. 44, at 452; *Winters* v. *New York*, 333 U.S. 507, 509 (1948). See also, *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943).

[46] *Grosjean* v. *American Press Co., supra* n. 29, at 250; *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)

and the distributor's right to circulate,[47] but also the public's "right to receive information and ideas" [48] and the *public's right to read.*

Butler v. *Michigan,* 352 U.S. 380 (1957), involved a state statute which made a criminal offense of the publication, sale and distribution of any literature "tending to the corruption of the morals of youth". The statute was challenged as an unconstitutional infringement of freedom of press and due process under the First and Fourteenth Amendments. The State's Attorney General denied that the statute did violence either to the free press clause of the First Amendment or to the due process clause of the Fourteenth Amendment. And the Attorney General of Texas, *amicus curiae,* claimed that the book there in question was not within the protection of the First Amendment's freedom of press.

This Court unanimously found the statute unconstitutional:

> "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society." (384-85)

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[47] *In the Matter of Jackson, supra* n. 44; *Winters* v. *New York,* supra n. 45.

[48] *Kleindienst* v. *Mandel et al., supra* n. 36; *Stanley* v. *Georgia,* supra n. 36, at 564; *Red Lion Broadcasting Co.* v. F.C.C., *supra* n. 35, at 390; *Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965); *Lamont* v. *Postmaster General, supra* n. 37, at 307-8 (Brennan, concurring). See also *New York Times Co.* v. *U.S.,* 403 U.S. 713 (1971).

Butler was decided in 1957. In 1965, this Court proclaimed the right—specifically—of school teachers to read, as part of their First Amendment rights, *Lamont* v. *Postmaster General, supra* n. 37 at 307. And in 1969, a plaintiff claimed "the right to read" and this Court confirmed that right, *Stanley* v. *Georgia, supra* n. 36 at 565.

As recently as April 29, 1974, this Court further broadened the constitutional protection for the RIGHT TO READ by also finding it within the constitutional guarantee for free speech under the First Amendment. In *Procunier* v. *Martinez, supra* n. 41, the Court was confronted with the censorship of mail written by prisoners. Writing for the Court, Mr. Justice Powell said:

> "Communication by letter is not accomplished by the act of writing words on paper. Rather it is effected only when the letter is read by the addressee . . . Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech . . ." (at 1809)

A leading scholar in this field recognized that

> ". . . the readers and consumers . . . have more at stake than anybody else." [49]

Thus, the Constitution protects more than freedom to print or write; without *reading* by the public "publication would be of little value."

The constitutional protections for Freedom of Press and Freedom of Speech were designed to achieve an

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[49] Chafee, *Reflections on the Law of Copyright: I*, 45 COL. L. REV. 503, 517 (1945).

end, *the right of the public to read.* In order to accomplish this end—which this Court has ruled to be included within the constitutional protection of each individual American—it is necessary to have reasonable access. Freedom of Press and Freedom of Speech must at the very least, include *freedom of access* to materials affecting the educational, cultural, historical, political, scientific and religious background of the nation. Anything less would hamstring a fundamental objective of the First Amendment, *the people's right to read.*

The applicable reach of the First Amendment is well illustrated by *Kleindienst* v. *Mandel et al., supra* n. 36, where both the majority and the minority agreed that the First Amendment guaranteed access to hear, to receive information, to learn, to know. Mr. Justice Blackmun, for the Court, said (at p. 762-3):

> "In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas'.
>
> > 'It is now well established that the Constitution protects the right to receive information and ideas. This freedom [of speech and press] . . . necessarily protects the right to receive . . .' *Martin* v. *City of Struthers,* 319 U.S. 141, 143 (1943) . . .' *Stanley* v. *Georgia,* 394 U.S. 557, 564 (1969)."

He also cited *Thomas* v. *Collins, supra* n. 42, at 534 (1945) as protecting the right of workers "to hear what he [a labor organizer] had to say". Mr. Justice Blackmun also cited *Red Lion Broadcasting Co.* v. *F.C.C., supra,* at 35, where Mr. Justice White, for a unanimous Court concerning the FCC's "fairness doctrine", stated of the First Amendment:

> ". . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other

> ideas and experiences which is crucial here. That right may not be constitutionally abridged either by Congress or by the F.C.C."

Kleindienst also cited *Lamont* v. *Postmaster General, supra* n. 37, upholding the right of an American citizen to receive communist political propaganda as a First Amendment right. Mr. Justice Blackmun stated: "This Court has recognized that this right is 'nowhere more vital' than in our schools and universities . . ."

Mr. Justice Blackmun also cited with approval the following from the District Court's opinion (at p. 764):

> "The concern of the First Amendment is . . . with the rights of the citizens of the country to have the alien enter and to hear him explain and seek to defend his views; that is of the essence of free government", 325 F.Supp., at 631.

In a comment peculiarly appropriate to the instant case, Mr. Justice Blackmun stated:

> "The Government also suggests that the First Amendment is inapplicable because appellees have free access to Mandel's ideas through his books, and speeches . . . While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests—a balance we find unnecessary here in the light of the discussion that follows . . .—we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access." (at p. 765)

". . . the Court's previous decisions concerning the 'right to receive information', . . . " (to use Mr. Justice Blackmun's expression, at p. 762-3) were accepted by

the dissenting opinions. Mr. Justice Douglas, wrote (at page 771):

> The First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know. *Martin* v. *Struthers,* 319 U.S. 141, 143; *Stanley* v. *Georgia,* 394 U.S. 557, 564."

And Mr. Justice Marshall's dissenting opinion, in which Mr. Justice Brennan joined, states:

> "As the majority correctly demonstrates, in a variety of contexts this Court has held that the First Amendment protects the right to receive information and ideas, the freedom to hear as well as the freedom to speak . . . the right to speak and hear—including the right to inform others and be informed about public issues—are inextricably part of that process. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin." (p. 775)

The comments of both majority and minority in *Kleindienst,* concerning the right to hear, as part of the First Amendment, apply with equal force to the right to read, and the right of access to copyrighted reading matter.

But, it may be asked, where is there anything in the First Amendment about "the right to read"? The same sort of question was faced directly by Mr. Justice Brennan in a case where the very issue of the right to read was involved and where this Court specifically stated that the First Amendment rights of school teachers protected their *right to read.*[50] In a concurring opinion, Mr. Justice Brennan said:

> "It is true that the First Amendment contains no specific guarantee of access to publications. How-

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[50] *Lamont* v. *Postmaster General, supra* n. 37 at 307.

> ever, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgement those equally fundamental personal rights necessary to make the express guarantees fully meaningful . . . I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." (at 308)

In a similar situation concerning the right of association, Mr. Justice Powell gave this Court's answer to this sort of inquiry:

> "Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedom of speech, assembly, and petition."[51]

He also stated that ". . . the Constitution's protection is not limited to direct interference with fundamental rights." (at p. 183) Mr. Justice Powell made a point that is relevant in the current case: "We are not free to disregard the practical realities." (at p. 183)

Mr. Justice Powell extended "the practical realities" to a constitutional recognition that the *right to read* a letter written by a prisoner is guaranteed to the addressee of that letter by the free speech guarantee of the First Amendment.[52]

On the facts of the instant case, Respondent's practice is within the permissible realm of "fair use" which

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[51] *Healy et al* v. *James et al.*, 408 U.S. 169, 181 (1972)

[52] *Procunier* v. *Martinez, supra* n. 41, at 1809.

derives from the right of access that is constitutionally-protected by the First Amendment's Free Press and Free Speech clauses. For the purpose of this case, it is not necessary to decide the outer reach of such right.

4. *The First Amendment Protects the Student's Right to Learn*

The First Amendment protects, as has already been indicated,

—the right of "suitable access to social, political, esthetic, moral and other ideas and experiences"

—the right to "receive information and ideas"

—the right to receive printed matter

—the right to hear

—the "right to read"

So far as the student is concerned, all of these constitutionally protected rights add up to the RIGHT TO LEARN, a right that derives directly from the First Amendment.[53]

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[53] A similar protection emanates from the Fourteenth Amendment. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) (". . . denotes . . . . the right of individual to acquire useful knowledge . . ."). See also *Serrano v. Priest*, 5 Cal. 3d 584, 589, 487 Pac. 2d 1241 (1971). (At 618: ". . . in a democratic society free public schools shall make available to all children equally the abundant gifts of learning."). See also *Hobson* v. *Hanson*, 269 F.Supp. 401, 480, 488, 492, 512-3 (196[illegible], *app. dism'd.* 393 U.S. 801 (1969) where the Court struck down a school board's "track system" of assigning pupils as being contrary to their right to learn. The decision was based on the equal protection clause.

This Court said that the "aim" of the First Amendment "was to unlock all ideas . . ." [54] Mr. Justice Douglas said that

> ". . . the First Amendment involves . . . the right . . . to learn, to know . . ." [55]

This constitutionally-protected *right to learn* requires reasonable access, through "fair use", to copyrighted materials which are basic to the learning process.

5. *The First Amendment Protects the Freedom of Teachers and Students to Reasonable Access to Copyrighted Materials*

This Court has said that

> "The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." [56]

This right involves not only the Respondent in this case but also the teaching process in the United States, with its many million teachers and students. And, of course, children are within the protection of the Bill of Rights. "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." [57] The Sixth Amendment protects a 12-year old,[58] and First Amendment rights apply to teen-agers.[59]

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[54] *Times Film Corp.* v. *Chicago,* 365 U.S. 43, 81 (1969).

[55] *Kleindienst* v. *Mandel et al., supra n.* 36, at 771 (dissenting). For the "right to know" under the Ninth Amendment, see *infra.*

[56] *Shelton* v. *Tucker,* 364 U.S. 479, 487 (1960).

[57] *In re Gault,* 387 U.S. 1, 13 (1967).

[58] *In re Winship,* 397 U.S. 358 (1970).

[59] *Tinker* v. *Des Moines School District,* 393 U.S. 503 (1969); *Board of Education* v. *Barnette,* 319 U.S. 624 (1943).

Chief Justice Warren said, for this Court, that

> "Teachers and students must always remain free to inquire, to study and to evaluate . . ." [60]

The First Amendment is basic to effective teaching. As this Court has stated:

> 'The First Amendment was designed to enlarge, not to limit, freedom in literature and in the arts as well as in politics, economics, law, and other fields . . . Its aim was to unlock all ideas for argument, debate, and dissemination." [61]

Both the teaching and the learning process require such "unlocking" of ideas through reasonable access to knowledge, which means reasonable access via "fair use" to materials subject to copyright protection. Cardozo put it well:

> "There is no freedom without choice and there is no choice without knowledge . . . Implicit, therefore, in the very notion of liberty is the liberty of the mind to absorb and beget . . . At the root of all liberty is the liberty to know." [62]

As illustrated by the NEA's statement of interest, *supra,* we have here a situation in which this Court can not shut its eyes to "the plainest facts of our national life".[63]

We have here far more than "harmless, empty shadows".[64] A "pragmatic assessment [65] of the instant

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[60] *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957).

[61] *Times Film Corp.* v. *Chicago*, 365 U.S. 43, 81 (1961).

[62] CARDOZO, PARAZOXES (1928), 104.

[63] *NLRB* v. *Jones & Laughlin Steel Corp., supra* n. 9, at 41 (1937).

[64] *Poe* v. *Ullman*, 367 U.S. 497, 508 (1961).

[65] *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 442 (1957).

situation justifies the fear that by ignoring First Amendment rights the Petitioner's position, if applied to the educational system, could destroy the capacity of America's teachers to teach effectively and seriously inhibit the effectiveness of the pupils' learning process.

C. The Ninth Amendment Protects the Right of Americans to Knowledge and to Read

The Ninth Amendment to the Constitution provides as follows:

> "The Enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

This is the reserved right of the American people to all rights not specifically granted by the Constitution, the right to all unenumerated rights.

The Ninth Amendment was described in Mr. Justice Goldberg's concurring opinion (for himself, the Chief Justice and Mr. Justice Brennan) in *Griswold* v. *Connecticut:* [66]

> "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments . . ." (p. 488)

He continued:

> "The Ninth Amendment simply shows that the intent of the Constitution's authors that other fundamental rights should not be denied such protection or disparaged in any other way simply because

[66] 381 U.S. 479 (1965).

> they are not specifically listed in the first eight constitutional amendments." (p. 492)

Mr. Justice Goldberg saw the following as the "fundamental rights" protected by the Ninth Amendment but not listed in the previous eight:

> "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U.S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . ." *Powell* v. *Alabama,* 287 U.S. 45, 67. "Liberty" also gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." *Poe* v. *Ullman,* 367 U.S. 497, 517 (dissenting opinion of Mr. Justice Douglas)" (p. 493-4).

There is strong historical justification for the belief that the intent of the framers of the Bill of Rights was that the Ninth Amendment should apply "where the asserted right appears to the court as fundamental to a free sociey but is, nevertheless, not specified in the Bill of Rights".[67]

In a democracy nothing is more fundamental than the right of the people to have reasonable access to the cultural heritage of the nation. This is an absolute

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[67] Redlich, *Are There 'Certain Rights Retained by the People'?* 37 N.Y.U.L. Rev. 787, 808 (1962).

necessity for teachers, if a democracy is to survive and protect itself as a free society.

> "The Ninth Amendment is a reservoir of personal rights necessary to preserve the dignity of existence of man in a free society." "The Ninth Amendment is the place to which we must turn for protection of individual liberty from infringements not enumerated and perhaps not contemplated, by the founding fathers." [68]

"The ninth amendment was intended to assert that the constitutional formulations were not to be narrowly interpreted".[69] A leading legal commentator indicates that, whatever else the Amendment may cover, it provides for "the right to have access to information . . .":

> "Related to this right to information is the right to know as encompassed in academia and cultural freedom. A college professor or school teacher has the right to pursue knowledge . . ." [70]

Another distinguished commentator said (even before *Griswold*):

> "One of the newest of the unenumerated rights is that to knowledge." [71]

If the right of young people to wear long hair in school comes within the penumbra of the First Amend-

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[68] *State* v. *Abelloni*, 50 Hawaii 384, 390, 393 (1968) (Levenson, J. concurring).

[69] Kutner, *The Neglected Ninth Amendment: The 'Other Rights' Retained by the People*, 51 MARQ. L. REV. 121, 125 (1968).

[70] *Ibid.*, at 139.

[71] O. John Rogge, *Unenumerated Rights*, 47 CAL. L. REV. 787, 811 (1959).

ment and the reach of the Ninth Amendment,[72] then how much more valid is the application of the Ninth Amendment to something as fundamental to a free democratic society as the right of those same students (and their teachers) to reasonable access, through "fair use", to that society's cultural heritage?

But what about the impact of the copyright provision of the Constitution (Article 1, Section 8) on the Ninth Amendment? In *Ashwander* v. *TVA*,[73] this Court stated:

> "And the Ninth Amendment . . . does not withdraw the rights which are expressly granted to the Federal Government. The question is as to the scope of the grant and whether there are inherent limitations . . ."

The Ninth Amendment's reach starts, at least, from the limited "scope of the grant" for copyright legislation and from the "inherent limitations" so clearly illustrated by the judicial development of the doctrine of "fair use" notwithstanding the seemingly complete monopolies granted by the copyright laws.

Under the Ninth Amendment, "rights may arise or appear by reason of limitations placed upon or by limits of granted powers".[74]

> "A person has the right not to have the government act where it lacks power. In addition, he

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[72] *Breen* v. *Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. den.* 398 U.S. 937 (1970). *Contra, King* v. *Saddleback Jr. Col. Dist.*, 445 F.2d 932 (9th Cir. 1971), *cert. den.* (with 2 dissents) 404 U.S. 979 (1971).

[73] 297 U.S. 288, 330-1 (1936).

[74] Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L. J. 309, 311 (1936).

> has other rights, which deny government power to act where otherwise it might. For example, the government has the power to regulate bankruptcy proceedings [U.S. Constitution, Art. I, Section 8], but it lacks power to regulate them in such a way that a property owner is deprived of property without due process of law [*Louisville Bank* v. *Reedford,* 295 U.S. 555 (1935)]. The government has power to preserve its own existence [*Dennis* v. *U.S.,* 341 U.S. 494, 501 (1951)], but that power is tempered by the rights guaranteed by the First and Fifth amendments [Aptheker v. Secretary of State, 378 U.S. 500 (1964)]. Similarly, where a person has an inherent right, recognized by the ninth amendment, it protects him against some exercise of power which might otherwise be proper. . . . It is in areas where government has power to act that it is important to the individual to have positive rights." [75]

The balancing of various constitutional provisions seemingly applicable to the same set of facts is not a unique experience for this Court. Recently Mr. Justice Rehnquist for the Court, cited with approval an earlier decision of this Court as follows:

> "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 332 (1964).[76]

And Mr. Justice Stewart concurring in the same case, stated:

> " . . . And it most assuredly is not to say that the Twenty-first Amendment necessarily overrides in

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[75] Comment, G. L. Garner, *The Ninth Amendment,* 30 ALBANY L. REV. 89, 99 (1966).

[76] *California* v. *La Rue,* 409 U.S. 109, 115 (1972).

> its allotted area any other relevant provisions of the Constitution." [77]

Amicus respectfully submits that, the copyright clause notwithstanding, the Ninth Amendment guarantees and protects the right of American citizens *to read* the cultural heritage of their nation, and authorizes for teachers *reasonable* access to such heritage for their teaching duties, even when the material so used is in copyrighted form. These rights come within what Mr. Justice Douglas, speaking for the Court in *Griswold,* and specifically mentioning the Ninth Amendment, called

> "penumbras, formed by emanations from those [Bill of Rights] guaranties that help give them life and substance." [78]

The Ninth Amendment fully authorizes the Respondent's practices in this case as constitutionally-protected "fair use".

D. The Constitution Is A Living Document.

The Constitution is a living and sensitive document which adjusts to the major needs of the American people. The Bill of Rights protects freedom of reasonable access to the nation's cultural heritage, under the copyright law, and thus sanctions Respondent's practice in this case. That the articulation of the constitutional right of reasonable access might appear novel is no defense against its validity. Chief Justice Burger stated that it makes no constitutional difference "that it has taken this Court nearly two centuries

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[77] *Ibid.*, footnote page 120.

[78] *Supra* n. 66, at 484.

to 'discover' a constitutional mandate . . ." [79] In *Johnson* v. *Louisiana* [80] this Court reinterpreted a 200-year-old and admittedly settled doctrine of American legal history. What was involved there, as well as here, is what Mr. Justice Powell called "a change in focus in the Court's approach . . ." [81] and the requirement for "a fresh look at the question . . ." [82] Only in 1972 did this Court find constitutional infirmity in capital punishment under the Eighth Amendment although admittedly it had "been employed throughout our history." [83] It was not until 1973 that this Court held that anti-abortion statutes were unconstitutional [84] and that a six-member jury in civil proceedings complied with the Seventh Amendment.[85] And not until July 1974 did this Court rule that the President of the United States had no absolute right of executive privilege.[86]

The very fact that constitutional protection for "fair use" has not been customarily articulated is in itself an aid to this Court in the present instance. As this Court stated more than 90 years ago:

> "The question is now a new one in this court, and we are not fettered by an inveterate course of de-

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[79] *Coleman* v. *Alabama*, 399 U.S. 1, 22 (1970).

[80] 406 U.S. 404 (1972).

[81] *Ibid.*, p. 372, note 9. (concurring)

[82] *Ibid.*, p. 376. See also *Erie* v. *Tompkins*, 304 U.S. 64 (1938); *Brown* v. *Board of Education*, *supra* n. 3; *Cooper* v. *Aaron*, 359 U.S. 1 (1958).

[83] *Furman* v. *Georgia*, 408 U.S. 238 (1972).

[84] *Roe et al.* v. *Wade*, 410 U.S. 113 (1973).

[85] *Colgrove* v. *Bettin*, 413 U.S. 149 (1973).

[86] *U.S.* v. *Nixon*, 418 U.S. , 42 L.W. 5237 (July 24, 1974).

> cision upon it. We are at liberty . . . to decide it upon reason and not by precedent." [87]

As the ancient law giver Maimonides put it, the gates of interpretation are never closed.[88]

This Court has said:

> "The Constitution of the United States . . . was made for an undefined and expanding future.
>
> "It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government." [89]

With reference to the meaning of words in constitutional context, Mr. Justice Holmes said:

> "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begettors . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." [90]

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[87] *Conner* v. *Long*, 104 U.S. 228, 243 (1881).

[88] THE GUIDE OF THE PERPLEXED (ed. S. Pines, Univ. of Chicago, 1963), 327-8.

[89] *Hurtado* v. *California*, 110 U.S. 516, 531, 530 (1884).

[90] *Missouri* v. *Holland*, 252 U.S. 416, 433 (1922).

This Court cited with approval another relevant comment by Mr. Justice Holmes:

> "But as Mr. Justice Holmes once said: 'The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.' *Gompers* v. *United States,* 233 U.S. 604, 610." [91]

The sensitivity of the Constitution to "the new circumstances and situations" constantly facing the American people, its "adaptability",[92] is especially true of the great liberties protected by the First Amendment.

As Mr. Justice Frankfurter said: "Some words are confined to their history; some are starting points for history. Words are intellectual and moral currency . . . Like currency words sometimes appreciate or depreciate in value." [93] Cardozo said: "The great generalities of the Constitution have a content and significance that vary from age to age." [94]

Words can "import a policy that goes beyond them." [95] In constitutional interpretation it is neces-

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[91] *Konigsberg* v. *State Bar of California,* 366 U.S. 36, 49-50, note 10 (1961).

[92] *Appalachian Coals Inc.* v. *United States,* 288 U.S. 344, 360 (1933), per Hughes, Ch. J.

[93] Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Col. L. Rev. 527, 537-38 (1947).

[94] Nature of the Judicial Process (1921), 17.

[95] Holmes J., *Olmstead* v. *United States,* 277 U.S. 438, 469 (dissenting); majority decision overruled, *Katz* v. *U.S.,* 389 U.S. 347, 352 (1967).

sary to go "far beyond the meaning of the phrase in isolation" to its "guiding history".[96]

The purpose of Constitutional provisions is the controlling feature in their application according to this Court. Mr. Justice McKenna said for this Court:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. *Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth.* This is peculiarly true of constitutions . . . In the application of a constitution, therefore our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power . . . *Rights declared in words might be lost in reality.* And this has been recognized. The meaning and vitality of the Constitution has been developed against narrow and restrictive construction."[97]

This Court has long been responsive to the special need for guarding the Bill of Rights and especially First Amendment rights "with a jealous eye".[98] A

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[96] *Chapman* v. *United States*, 365 U.S. 610, 619 (1961), per Frankfurter, J., concurring. *Cf:* "Reasoning which in one age would make no impression whatsoever, in the next age is received with enthusiastic applause", I Lecky, HISTORY OF THE RISE AND INFLUENCE OF THE SPIRIT OF RATIONALISM IN EUROPE, vii (1865).

[97] *Weems* v. *United States*, 217 U.S. 349, 373 (1910) (emphasis added.) *Cf:* Mr. Justice Harlan, dissenting, *Poe* v. *Ullman*, *supra* n. 64, at 544.

[98] *AFL* v. *Swing*, 312 U.S. 312, 325 (1941).

liberal interpretation of such rights has been called by this Court "the only conclusion supported by history":

> "For the First Amendment does not speak equivocally . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."
>
> ". . . the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."[99]

First Amendment rights have been persistently protected from erosion by indirection as well as by direct act.[100] "Sophisticated as well as simple minded" evasions of Constitutional rights have been condemned.[101] "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name."[102] The substance, "the thing", in Freedom of Press, is *freedom of reasonable access.*

The extraordinary genius of the Bill of Rights is its adaptability to the problems of each successive generation of Americans. The present generation's special

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[99] *Bridges* v. *California*, 314 U.S. 252, 263, 265 (1941). See also *Olmstead* v. *United States, supra* n. 95, at 471, 476.

[100] *Guinn* v. *United States*, 238 U.S. 347, 361 (1915); *Grosjean* v. *Amer. Press Co., supra* n. 29, at 250 (1936); *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958). See also *United States ex rel Milwaukee Publication Co.* v. *Burleson*, 255 U.S. 407, 430-31 (1931) (Brandeis, J., dissenting); *United States* v. *Rumely, supra* n. 9 at 58 (Douglas J., concurring).

[101] See Mr. Justice Frankfurter's comment, *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939). *Cf: Louisiana ex rel Gremelion* v. *NAACP*, 366 U.S. 293 (1961).

[102] *Cummings* v. *Missouri*, 4 Wall. 277, 325 (1866).

and urgent problem is the protection and assurance of the American people's right of reasonable access to its cultural heritage through the doctrine of "fair use" of copyrighted materials. The history of the struggle for Freedom of Press and Freedom of Speech bars any notion that the Bill of Rights provides freedom to print and disseminate information but denies freedom to acquire it through reasonable access and "fair use". In the context of mid-20th century America and the present world situation, *Freedom of Press must embody reasonable access, and "fair use" of, the nation's heritage.*

The very nature of the Bill of Rights calls for its interpretation and re-interpretation to meet new and undecided issues. Such is this case.

E. In "Balancing" Interests, Courts Must Give Priority to the Public Interest (For Reasonable Access) Over the Statutory Privilege of a Copyright Proprietor

"Cases such as this one inevitably call for a delicate balancing of important but conflicting interests", said Mr. Justice White in a different context. That statement is completely applicable here.[103]

> "When Congress' exercise of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is our 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." [104]

As Mr. Justice Marshall wrote:

> "As *Robel* and many other cases show, all governmental power—even the war power, the power to

[103] *State of Wisconsin* v. *Yoder et al.*, 406 U.S. 205, 237 (1972) (concurring).

[104] *U. S.* v. *Robel*, 389 U.S. 258, 264 (1967).

> maintain national security, or the power to conduct foreign affairs—is limited by the Bill of Rights. When individual freedoms of Americans are at stake, we do not blindly defer to broad claims of the Legislative or Executive, but rather we consider those claims in the light of the individual freedom." [105]

And as has already been noted, Mr. Justice Rehnquist adopted the following language where two constitutional provisions seem relevant,

> ". . . each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case . . ." [106]

"Balancing" has a unique context in copyright matters. As Story said in one of the very early cases:

> "Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussion, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, almost evanescent." [107]

And Chafee stated that

> "Copyright admits of philosophic thinking more than most other parts of the law." [108]

Holmes warned courts of this sort of special problem:

> "I think that judges themselves have failed adequately to recognize their duty of weighing con-

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[105] *Kleindienst* v. *Mandel et al.*, *supra* n. 36, at 782-3 (dissenting).

[106] *California* v. *LaRue*, *supra* n. 76, at 115.

[107] *Folsom et al.* v. *Marsh et al.*, 9 Fed. Cas. 342, No. 4901, at 344 (1811).

[108] Chafee, *supra* n. 49, at 503.

> siderations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious . . . " [109]

1. *Primacy of the Public Interest in Copyright Law*

The Congress, this Court, and the Register of Copyrights have all affirmed the primacy of the public interest over the copyright proprietor's interest:

The House Report on the present law stated that copyright was enacted

> "not primarily for the benefits of the author, but primarily for the benefit of the public." [110]

This Court has said:

> " . . . the copyright law . . . makes a reward to the owner of secondary consideration." [111]

The Register of Copyrights stated to Congress in his Report: [112]

> "Within limits the author's interests coincide with those of the public. Where they conflict the public interest must prevail. . . . And the interests of the authors must yield to the public welfare where they conflict." (p. 6)

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[109] Holmes, *The Path of the Law*, 10 HARV. L. REV. 458, 467 (1897).

[110] House Report No. 2222, 60th Cong., 2d Sess., p. 9.

[111] *Mazer* v. *Stein*, *supra* n. 17, at 219 (1954). *Accord.: U.S.* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948); *U.S.* v. *Loew's Inc.*, 371 U.S. 38, 46 (1962).

[112] COPYRIGHT LAW REVISION, Report of the Register of Copyrights, House Com. Print, 87th Cong., 1st Sess. (July 1961).

> "The needs of all groups must be taken into account. But these needs must also be weighed in the light of the paramount public interest." (p. xi)

In "balancing" between the copyright owner's mere statutory privilege and the user's constitutional rights, the decision must fall on the user's side of the line, in terms of the concept adopted by this Court.[113]

With particular reference to the judicial doctrine of "fair use"—the issue at stake in this case—the courts gave as a justification for their doctrine the constitutional requirement to subordinate the interest of the copyright proprietor to the public interest.[114]

Heed to the fragility of constitutional rights was urged by this Court. The "spike mike" decision, said Mr. Justice Stewart,

> "is based upon the reality of an actual intrusion into a constitutionally protected area. What the Court said long ago bears repeating now: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' *Boyd* v. *United States,* 116 U.S. 616, 635." [115]

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[113] *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968).

[114] *Berlin* v. *E. C. Publications Inc.*, 329 F.2d 541, 543-4 (2d Cir. 1961), *cert. den.* 379 U.S. 822; *Rosemont Enterprises Inc.* v. *Random House, Inc.*, 366 F.2d 303, 309 (2d Cir. 1966), *cert. den.* 385 U.S. 1009; *Greenbie* v. *Noble*, 151 F. Supp. 45, 67 (D.C.N.Y. 1957).

[115] *Silverman* v. *U.S.*, 365 U.S. 505, 512 (1961).

Inconspicuous rejection or unrecognized suppression of reasonable access (or "fair use") to materials vital to the teaching and learning of America's cultural heritage can, and often is, achieved through copyright.

Petitioner's position could well deprive Respondent —and, by extension, millions of teachers and students in America's schools—of rights of Freedom of Press guaranteed by the First Amendment.

2. *Copyright Monopoly Must Be Strictly Construed*

This Court has indicated that copyright ownership is a monopoly. For the Court, Chief Justice Hughes said:

> "The owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property." [116]

"Copyrights", the Attorney General of the United States stated, "are forms of monopolies . . . " [117] Even at its best, wrote the Assistant Librarian of this Court, "copyright necessarily involves the right to restrict as well as to monopolize the diffusion of knowledge." [118] In *Fortnightly,* this Court showed its antipathy to broadening the scope of the copyright owner's monopoly:

> "The Copyright Act does not give a copyright holder control over all uses of his copyrighted

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[116] *Fox Film Corp.* v. *Doyal, supra* n. 17, at 127.

[117] House Rep. No. 1742, on H.J. Res. 676, 87th Cong., 2d Sess. (May 2, 1962), p. 6.

[118] Hudon, *The Copyright Period: Weighing Personal Against Public Interest,* 49 ABAJ 759 (1963).

> work. Instead, § 1 of the Act enumerates several 'rights' that are made 'exclusive' to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these 'exclusive rights', he infringes the copyright. If he puts the work to a use not enumerated in § 1, he does not infringe." [119]

In a patent case arising under the copyright-patent provision of the Constitution, Mr. Justice White said for this Court:

> "Moreover, we must consider petitioner's claim in the light of this Nation's historical antipathy to monopoly." [120]

Mr. Justice Douglas recently adverted to the relationship between monopoly and the constitutional status of copyright:

> "While this Court has not had many occasions to consider the constitutional parameters of copyright power, we have indicated that the introductory clause, "To promote the Progress of Science and useful arts", acts as a limitation on Congress' power to grant monopolies through patents. In

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[119] *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 20 L.Ed. 2d 1176, 1180 (1968). Footnote 8 of the Court's opinion reads in part, as follows:

"8. 'The fundamental [is] that "use" is not the same thing as "infringement," that use short of infringement is to be encouraged . . .,' Kaplan, An Unhurried View of Copyright 57 (1967)." This quotation was again cited in *Teleprompter Corp.* v. *C.B.S.*, 415 U.S. 394, 94 S. Ct. 1129, 1133 (March 4, 1974).

[120] *Deepsouth Packing Co., Inc.* v. *The Laitram Corp., supra* n. 23, at 530. A footnote to this statement said, "See the discussion in *Graham* v. *John Deere*, 381 U.S. 1, 7ff (1966)".

Graham v. *John Deere Co.*, 383 U.S. 1, 5-6, we said:

> 'The clause is both a grant of power and a limitation . . . The Congress in the exercise of the patent power may not overreach the restraints posed by the stated constitutional purpose . . . "

He continued:

> "The framers of the Bill of Rights added the guarantees of freedom of speech and of the press because they did not feel them to be sufficiently protected by the original Constitution. This liberty is necessary if we are to have free, open, and lively debate of political and social ideas . . . *We should not construe the copyright laws to conflict so patently with the values that the First Amendment was designed to protect.*" [121]

Petitioner argues (Brief, p. 42) that whatever may have been legal prior to photocopying, the whole context has changed (to the presumed detriment of the user's legal rights) with the advent of the photocopying machine. This is erroneous in constitutional terms. That the photocopier was not contemplated in 1909, when the present copyright law was enacted, gives the copyright owner no greater monopoly than he would have had with earlier systems of reproducing copies. See, for example, *U. S. et al.* v. *Midwest Video Corp.*, 406 U.S. 649, 650 (1972), where the Court held that the Federal Communications Commission had jurisdiction over CATV although CATV "was developed long after enactment of the Communications Act of 1934." See

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[121] *Lee et al.* v. *Runge*, 404 U.S. 887, 888-9, 892-3 (1971) (dissenting on denial of petition for writ of certiorari) (emphasis added).

also concurring opinion of Chief Justice Burger (at p. 649).

It is also relevant to note that the Copyright Office submitted a brief *amicus* to this Court in *Mazer* v. *Stein, supra* n. 17, which made the important point that the method of reproduction does not affect the copyrightability of a work. The Copyright Office's *Brief Amicus* to this Court in *Mazer* stated:

> "Literary works which in an earlier era would perhaps have been reproduced by hand on illuminated parchment or in other single copies have not become less copyrightable by virtue of their present reproduction in thousands of copies by manufacturing techniques involving the use of movable types, plates, etc. Similarly, painting masterpieces once reproduced on canvas or as murals in single copies are now frequently reproduced in color plates for distribution in thousands of individual copies or in periodical or book form. *Neither the mechanical and manufacturing processes used in this reproduction, the number of copies . . . would appear to affect the copyrightability or essential nature of the work itself.*" (pp. 30-1, n. 13) (*italics supplied*)

It would seem an *a fortiori* conclusion that the same proposition constitutionally applies to "fair use" and that reasonable copying for non-profit educational purposes does not become an infringement because it is done by photoduplicators rather than by hand.

Thus, in terms of "balancing" rights, the monopoly-granting power of the copyright provision of the Constitution must be construed in a manner consonant with two fundamental considerations:

(1) that Congress's monopoly-granting power in copyright is very limited and restricted; and

(2) that the copyright-granting power of Congress cannot override rights protected by the First and Ninth Amendments of the Bill of Rights.

In "balancing" the interests involved, it is sufficient for this Court to rule that in the current case the Respondent acted within its rights. It is not necessary, in this case, to reach any other questions on the relationship of the First Amendment and the copyright clause.[122] This is all the more true since we have here merely a question of determining the meaning and scope of the judicial doctrine of "fair use". In this case, Respondent's use was clearly a "fair use". The further reach of the constitutional protection, if any, must await the customary case-by-case determination based on specific facts of the particular case.

F. The Burden of Proof is on the Copyright Proprietor to Show That an Alleged Infringement is Not Protected by the First or Ninth Amendments

Significant procedural effects attach to the concomitant legal conclusions that copyright is merely a statutory privilege whereas "fair use" has constitutional protection. Without its constitutional dimension, "fair use" has been regarded as merely an affirmative defense, which puts the burden of proof on the user, as an alleged infringer, to prove that the alleged infringement was a "fair use". B. RINGER AND P. GITLIN, COPYRIGHTS (Rev. 1965 ed.), pp. 68-9; NIMMER, *supra,* Section 145. However, once "fair use" is properly vested with its appropriate constitutional basis, the burden of proof shifts to the copyright proprietor

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[122] See *Ashwander* v. *TVA, supra* n. 73, at 347 (Brandeis, J., concurring).

to prove that an alleged infringement is not protected by the First and Ninth Amendments.

This location of the burden of proof is an appropriate adjustment between a statutory privilege (i.e., copyright) and a constitutionally-guaranteed right ("fair use").

II. CUSTOMARY USE IS "FAIR USE" UNDER THE COPYRIGHT LAW

A use that has been sanctioned by custom *is* "fair use", without regard to other criteria which may be applicable to uses not sanctioned by custom. Once a "fair use" has been moulded by custom, it operates without regard to the normal criteria used for determining whether a use is a "fair use".

A. Custom and the Common Law

"Fair use" is a common law doctrine, fashioned by the courts themselves. The courts have rejected the purportedly "exclusive" rights of the copyright proprietor, by developing the common law doctrine that some uses, "fair uses", are exempted from the copyright proprietor's monopoly.

The history of Anglo-Saxon law teaches that common law springs, to a large degree, out of custom. Holmes, in the opening paragraph of THE COMMON LAW (1881), said: "The life of the law is not logic, but experience." (p. 5).

Elsewhere in the same classic, Holmes speaks of a specific field of law:

> " . . . may only mean that the custom of the realm and the common law are the same thing . . . " (p. 150)

Story wrote:

> "The common law is the *lex non scripta,* that is, the unwritten law, . . . composed of customs, and usages, and maxims." [123]

Blackstone wrote:

> "The unwritten or Common Law is properly distinguishable into three kinds: (1) General customs . . . (2) Particular customs . . . (3) Certain particular laws . . . " [124]

Holland put it thus:

> "Custom exists in law in every country . . . It is known in England as 'the common law' . . . " [125]

Our courts have accepted this same doctrine. This Court said in 1870:

> "Customs have sprung from the necessities and convenience of business and prevailed in duration and extent until they acquired the force of law. This mass of our jurisprudence has thus grown, and will continue to grow, by successive accretions." [126]

And similar expressions have been found in more recent Federal decisions:

> —" . . . a lawful custom is itself part of the common law." [127]
>
> —"A lawful custom is part of the common law . . . " [128]

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[123] STORY, MISCELLANEOUS WRITINGS, (1852, reprint 1969) 442.

[124] COMMENTARIES, pp. 67-8.

[125] THE ELEMENTS OF JURISPRUDENCE (1910), 59.

[126] *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 651 (1870).

[127] *Nicoll* v. *Pittsvein Coal Co.*, 269 F. 968, 971 (2d Cir. 1920).

[128] *U.S. Shipping Board E. F. Corp.* v. *Levensaler*, 290 F. 297, 300 (C.A.D.C. 1923), *cert. den.* 266 U.S. 630 (1924).

B. Custom and "Fair Use"

In one of the earliest copyright cases before it, this Court clearly indicated that "custom or usage" is a valid basis for determining the common law of copyright.[129]

A leading case speaks of:

> " . . . what is commonly referred to as a 'fair use' —one that is reasonable and customary." [130]

Another Federal Court defined "fair use" as follows:

> "Though technically an infringement of copyright, it is allowed by law on the ground that the appropriation is reasonable and customary." [131]

And a Federal Court of Appeals has stated that

> " . . . it is both reasonable and customary for biographers to refer to and utilize earlier works . . . " [132]

The same position had earlier been adopted by the very early English cases. In 1761, in a case where the question was the copying of one-tenth of a work, the court said:

> "Consider it upon the custom and usage." [133]

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[129] *Wheaton* v. *Peters*, *supra* n. 17 at 659.

[130] *Shapiro, Bernstein & Co. Inc.* v. *P. F. Collier and Son, Co.*, 26 U.S.P.Q. 40, 42 (S.D.N.Y. 1939).

[131] *Holdredge* v. *Knight Pub. Corp.*, 214 F. Supp. 921, 924 (D.C. Calif. 1963).

[132] *Rosemont Enterprises Inc.* v. *Random House, Inc.*, *supra* n. 114, at 308.

[133] *Dodsley* v. *Kinnersley*, 27 Eng. Rep. 270, 271 (1761).

In another early English case involving very substantial copying, an injunction was denied because

> " . . . it is very important to observe that, for many years, such a course as I have stated has been pretty generally adopted . . . " [134]

Halsbury states:

> "As regards the matter to which it relates, a custom takes the place of the general common law." [135]

The legal commentators on copyright have also equated custom and "fair use", at least since Drone in 1879: [136]

> "simply a use which is legally permissive, either because of the scope of a copyright, the nature of a work, *or by reason of the application of known commercial, social or professional usages, having the effect of custom,* insofar as these do not expressly run contrary to the plain language of copyright legislation." [137]

De Wolf described "fair use" as

> "a use technically forbidden by the law, but allowed as reasonable and customary . . . " [138]

Ball wrote:

> "Fair use is technically an infringement of copyright, but is allowed by law on the ground that the appropriation is reasonable and customary." [139]

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[134] *Saunders* v. *Smith*, 40 Eng. Rep. 1100, 1107 (1838).

[135] Laws of England (3rd ed. 1955).

[136] Drone, A Treatise on the Law of Property in Intellectual Productions (1879), 389.

[137] Weil, American Copyright Law (1917) 429 (underlining supplied).

[138] De Wolf, an Outline of Copyright Law (1925) 143.

[139] Ball, The Law of Copyright and Literary Property (1944) 260. Cited with approval in *Loew's Inc.* v. *C.B.S.*, *supra* n. 21, at 175.

Nicholson stated:

> "'Fair use' of copyrighted material has been defined by the courts as that extra-legal use that is usual, reasonable and customary." [140]

Similar comments appear in the law reviews. [141]

A significant comment was made by a distinguished and long-time leader of the copyright bar, Joseph A. McDonald:

> "Non-infringing uses are either 'fair use' as recognized in the decided cases or uses which are sanctioned by custom in the trade or in the business to which they relate. It might be argued that uses which are sanctioned by custom are impliedly authorized. This is true. However, such an authorization springs not from the owner of the material or his representative but from the overall framework of creation, licensing or use in the field. Under such circumstances the authorization, express or implied, of the individual owner is not needed by the user." [142]

This latter point is clear, and attested by many cases, that consent by the copyright owner is not necessary where custom has its effect:

> ". . . custom derives its efficacy from its adoption into law, and when once established is binding,

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[140] NICHOLSON, A MANUAL OF COPYRIGHT PRACTICE FOR WRITERS, PUBLISHERS AND AGENTS (2d ed. 1956) 91.

[141] Comments and Notes, *Copyright Fair Use—Case Law and Legislation*, 1969 DUKE L. J. 73, 88; Student Comment, *The Effect of the Fair Use Doctrine in Textbook Publishing and Copying*, Part II, 2 AKRON L. REV. 112 (1968); Case Note, 15 SO. CALIF. L. REV. 249 (1942).

[142] Jos. A. McDonald, *Non-Infringing Uses*, 9 BULL. OF COPYRIGHT SOCIETY OF U.S.A. 466 (Aug. 1962).

> irrespective of any manifestation of assent by parties concerned . . ." [143]

"Fair use" does not depend upon the consent of the copyright owner, whether it derives from various criteria or from custom independently of other criteria.

The absence of relevant cases has troubled some of the commentators. Nevertheless, Nimmer writes:

> "There is no reported case on the question of whether a single handwritten copy of all or substantially all of a protected work made for the copier's own use is an infringement or fair use. If such a case were to arise the force of custom might impel a court to rule for the defendant on the ground of fair use." [144]

Thus, "fair use" derives from two major sources, (1) customary use, and (2) other uses meeting certain criteria established by the courts. In both instances the courts have fashioned a common law doctrine independent of—and to some extent contradictory with—the copyright statute. Custom, therefore, is a basic source of "fair use". When such customary use is established, "fair use" prevails independent of the other criteria applicable in the absence of custom.

C. The Evidence Shows Custom Prevailed Here

The undisputed evidence in the trial of this case shows a history of at least 50 years of photocopying in

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[143] WILLISTON ON CONTRACTS, Section 649.

[144] NIMMER ON COPYRIGHTS, Sec. 146, p. 654 (1972). *Per contra:* Cohen, *Fair Use in the Law of Copyright*, ASCAP, COPYRIGHT LAW SYMPOSIUM, No. 6 (1955), 42 at 51; Crossland, *The Rise and Fall of Fair Use; The Protection of Literary Materials Against Copyright Infringement by New and Developing Media*, 20 So. CAR. L. REV. 153, 154, 166 (1968).

library systems. Plaintiff's own witness, Karl F. Heumann, Executive Editor of the Federation of American Societies for Experimental Biology, replied to questions as follows:

> "Q. Are you familiar with library photocopying?
> A. Reasonably familiar.
> Q. How long would you say that has been going on?
> A. Fifty years.
> Q. Would you say that is the custom?
> A. Yes." [145]

The Director of the National Library of Medicine, Dr. M. M. Cummings, testified that copying has been "going on more than 50 years." [146]

There is other solid documentary evidence that the Library of Congress had a custom of copying, including photocopying, dating back at least until 1901, [147] and that after the enactment of the current copyright law in 1909, the Library of Congress continued and expanded this practice. [148] The former Acting Librarian of Congress, Verner Clapp, wrote:

> "Back in 1901, the regulations of the Library of Congress freely permitted photocopying, a room being reserved for the purpose, and this permission specifically ran to articles covered by copyright." [149]

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[145] T. 430-1.

[146] T. 455. See also Respondent's Exhibits No. 51, 74, and T. 431, 836.

[147] See Brief *Amicus Curiae* of Association of Research Libraries, *et al.*, before Commissioner, pp. 13-4.

[148] *Ibid.*, pp. 21 *et seq.*

[149] V. Clapp, *Can Copyright Law Respond to the New Technology*, 64 LAW LIBRARY J. 387 (No. 4, Nov. 1968).

Undisputed testimony in this case by the Deputy Director of the National Medical Library, Scott Adams, reaffirms this statement by Verner Clapp:

> "Let me say that this code of practice—that it is rooted in custom; it goes all the way back to the beginnings of the century, or even before the beginning of the century . . . During the intervening years this has become a well-established custom, a well-established practice." [150]

Apropos of this historical evidence of custom for library photocopying, it is pertinent to note that this Court has held, in another context, that where usages and procedures were in actual practice at the time legislation was enacted, it must be reasonably assumed that they became an accepted part of the legislation. [151]

The relevance and importance of customary use to "fair use" is especially important in America's schools. At the end of the October 1973 term, this Court relied very heavily on "tradition in public education" [152] a reliance likewise accepted by the concurring opinion of Mr. Justice Stewart (at p. 5261). In the schools of this nation there has been a custom that is at the least traditional and may extend from time immemorial, to make reasonable use and copies of copyrighted materials for non-profit educational purposes without specific permissions or consents from the copyright owners. This tradition and custom has, *in itself,* be-

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[150] T. 837-8.

[151] *Foti* v. *Immigration and Naturalization Service,* 375 U.S. 217, 223 (1963).

[152] *Millikin et al.* v. *Bradley et al.,* 418 U.S. , 42 L.W. 5249, 5237 (July 24, 1974).

come the legally permissible standard for "fair use" in such schools.

D. Common Sense Approach

". . . common sense often makes good law", said Mr. Justice Douglas.[153] After all, society's purpose in creating and fostering libraries as institutions for the preservation of culture is, at least in part, to enable successive generations to study that culture and heritage for the advancement of science and the arts. ". . . and it has been the custom from time immemorial for scholars and others to hand copy."[154] Verner Clapp, former Acting Librarian of Congress, looked at this whole matter in perspective:

> "Now from very earliest times, this record keeping profession [librarians] has facilitated copying. It facilitated copying with cuneiform styles, with goosequill pens and fountain pens and ball-point pens, with typewriters, photostat cameras, microfilm cameras, and now with coin-operated photocopying devices. It has taken technology in its stride for at least 3,000 years . . ."[155]

In this connection there is significance in the so-called Gentlemen's Agreement of 1935, to which reference is made by the Court below (Finding of Fact No. 41) This Agreement included the following statement:

> ". . . a student has always been free to 'copy' by hand; and mechanical reproductions from copy-

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[153] *Peak* v. *U. S.*, 353 U.S. 43, 46 (1957).

[154] Petre, *Statutory Copyright Protection for Books and Magazines Against Machine Copying*, ASCAP, COPYRIGHT LAW SYMPOSIUM, No. 14 (1966), p. 180. (" . . . it is submitted that photocopying single copies for private research is a 'fair use'." p. 202).

[155] Clapp, *op. cit., supra* n. 149, at 399.

> righted material are presumably intended to take the place of hand transcriptions, and to be governed by the same principles governing hand transcriptions." [156]

It is respectfully submitted that this statement makes sense. It represented at the time not a new practice but rather a reaffirmation of an existing custom accepted by all concerned in the field of publishing and libraries.

If the law fails to accepts the common sense point of view and the custom recognized in the Gentlemen's Agreement, the following comment seems appropriate:

> ". . . we are in the ridiculous position of insisting that the scholar has a right to make a copy for his private use only if he does so under conditions of maximum inefficiency in the use of his time and resources . . . [157]

Custom is stabilized common sense, a recognition by society of a stabilized relationship between possible or actual adverse parties. As Mr. Justice Frankfurter said, ". . . words acquire scope and function from the history of events which they summarize". [158]

"Our concern is with realities, not nomenclature", said Mr. Justice McReynolds, [159] and Mr. Justice Brewer stated that ". . . courts must recognize things as they are . . ." [160]

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[156] Respondent's Exhibit 74.

[157] R. Shaw, *Publication and Distribution of Scientific Literature*, College and Research Libraries, Vol. XVII(4), 293 at 302 (July 1956).

[158] *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 186 (1941).

[159] *Senior* v. *Braden*, 295 U.S. 422, 429 (1935).

[160] *Adams Exp. Co.* v. *Ohio State Auditor*, 166 U.S. 185, 225 (1897).

The realities of the present situation are that "fair use" includes the custom of library photocopying in this case.

III. CONCLUSION

The specific issue before this Court is whether the judicial doctrine of "fair use" authorizes the Respondent's practice in this case. *Amicus* respectfully submits that it does.

The doctrine of "fair use" is merely a short-hand way of saying that the copyright proprietor does *not* have complete monopoly despite the statutory language. "The Copyright Act does not give a copyright holder control over all uses of his copyrighted work." [161] "It would be idle and trite to say that no right is absolute". [162]

The judicial doctrine of "fair use", which was developed in the face of a seemingly exclusive copyrighted privilege, is a recognition of the public interest against monopoly. And with good reason, for as Drone once stated of "fair use",

> "The recognition of this doctrine is essential to the growth of knowledge . . ." [163]

The judicial development of "fair use" is an example of what the distinguished legal philosopher Morris R. Cohen once said:

> "If judges never make law, how could the body of rules known as the common law ever have arisen or have undergone the changes which it has." [164]

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[161] *Fortnightly Corp.* v. *United Artists Television Inc.*, *supra* n. 113, at 393.

[162] *Orient Ins. Co.* v. *Daggs*, 172 U.S. 557, 566 (1869). See also *Dennis* v. *U.S.*, 341 U.S. 494, 508 (1951).

[163] Drone, *op. cit.*, *supra* n. 136, at 386-7.

[164] COHEN, LAW AND THE SOCIAL ORDER (1933), 112.

The fashioning of Federal remedies to protect Federal rights has been recognized by this Court over the years. Recently, for example, this Court said:

> "The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only federal remedies available. 'It is not uncommon for federal courts to fashion federal law where federal rights are involved.' *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 457. When we deal with air and water in their ambient or interstate aspects, there is a federal common law, as *Texas* v. *Pankey* 441 F.2d, recently held." [165]

In such instances, this Court held that "There are no fixed rules that govern; . . .", and the Court's discretion prevails. [166]

> In *Textile Workers,* this Court said: "The range of judicial inventiveness will be determined by the nature of the problem." [167]

The present case calls for this same inventiveness in fashioning a remedy for the protection of Respondent's Federal constitutional and customary rights to continue the practice here involved. The doctrine of "fair use" is already in place and already codifies customary and acceptable practice. "Fair use"—as a common law doctrine—is not a static principle. It partakes of the common law's most characteristic trait, flexibility and sensitivity to changing developments,

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[165] *State of Illinois* v. *City of Milwaukee, et al.,* 406 U.S. 91, 103 (1972).

[166] *Ibid.,* at 106-7.

[167] *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456-7 (1957).

societal demands, and the public interest at any given time. As Madison once put it, "no language is so copious as to supply words and phrases for every complex idea."[168] Few ideas in the law are as complex as "fair use".

In initiating and developing the "fair use" doctrine the Anglo-American courts have shown their "judicial inventiveness" and their sensitivity to the need for fashioning a remedy "where federal rights are involved".

The instant case cries out for the courts, once again to fashion the parameters of their own "fair use" doctrine so as to recognize the validity of constitutional protections, customary uses, and the public interest in the advancement of knowledge and the sciences, by protecting the practice here *sub judice*.

For all the foregoing reasons, the decision of the Court of Claims should be affirmed and the Respondent's photocopying practice in this case should be held to be authorized.

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[168] *The Federalist*, No. 37 (Cooke ed., 1961), at 236.